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In the

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 31

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

BRIEF FOR RESPONDENTS, MARGARET HUNT HILL, TRUSTEE, CAROLINE and LOYD B. SANDS, and PLACID OIL COMPANY

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THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 619-642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinion Nos. 398 (R. 549-593) and 398A (R. 606-617), are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1964 (R. 643-644). By orders issued November 6 and 12, 1964, the time for filing petitions for writs of certiorari was extended to December 12, 1964 (R. 644, 645). Petitions were timely filed by the United Gas Improvement Company, *et al* (UGI) No. 21, the Public Service Commission of the State of New York (PSC) No. 22, Ocean Drilling and Exploration Company No. 26, and the Solicitor General on behalf of the Federal Power Commission (Commission) No. 32. Orders were entered granting all four petitions on March 8, 1965 (R. 645-647), 380 U.S. 931.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4, 7 and 19, 52 Stat. 821, *et seq*, as amended, 15 U.S.C. 717-717w) are set forth in Appendix A to Brief of Petitioners in Case No. 21, PP. 1a-6a.

QUESTIONS PRESENTED

1. Whether, in a reopened certificate proceeding under Section 7 of the Natural Gas Act judicially remanded to afford Applicants an opportunity to augment the record, the Federal Power Commission may refuse to admit and consider probative cost and economic evidence adduced by producers to show their sales are required by the public convenience and necessity.

2. Whether, assuming the Federal Power Commission has authority to require refunds of amounts previously collected pursuant to unconditioned permanent certificates, the Commission may require retroactive refunds without first determining that the amounts required to be refunded were unlawfully collected.

3. Whether, in a reopened and remanded certificate proceeding under Section 7 of the Natural Gas Act, the Federal Power Commission upon reconsideration, after fixing an initial rate without any consideration of whether such rate is just and reasonable, may impose, as a condition to the reissuance of permanent certificates, a moratorium on the filing of contractually authorized rate increases pursuant to Section 4 of the Natural Gas Act.

STATEMENT

The Federal Power Commission proceedings upon which this appeal is predicated involves a group of natural gas sales which were commenced in 1958 and 1959 pursuant to permanent certificates of public convenience and necessity granted by the Commission pursuant to Section 7 of the Natural Gas Act. Upon appeal these certificates were remanded to the Commission for further consideration so that the producer-applicants would have a further opportunity to present additional evidence in support of their contract prices.

Specifically, on September 4, 1958, the Commission in its Opinion No. 315, 20 FPC 264, granted Respondents Hill and

Placid, along with other producers, unconditioned, permanent certificates of public convenience and necessity authorizing sales of natural gas to Transcontinental Gas Pipe Line Corporation (Transco) at a price of 21.5¢ per MCF plus 2.05¢ per MCF tax reimbursement. After complying with the Commission's requirements regarding the filing of their respective gas purchase contracts, sales were initiated. In the interim, however, UGI and others sought judicial review. Although Opinion No. 315 was at first affirmed by the Court of Appeals for the Third Circuit,[1] it was subsequently summarily remanded to the Commission by this Court with instructions for "a reconsideration and redetermination in the light of *CATCO, (Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378 (1959))."[2]

The sale by Respondent Sands followed much the same pattern. On August 10, 1959, the Commission by Opinion No. 327, 22 FPC 378, granted an unconditioned, permanent certificate of public convenience and necessity to make a sale to Hope Natural Gas Company (Hope) at an initial price of 21.5¢ per MCF plus a tax reimbursement of 2.05¢ per MCF. Shortly thereafter, after establishing the Hope gas purchase contract as a rate schedule, deliveries of gas commenced. PSC and others, however, sought judicial review of Opinion No. 327. The Court of Appeals of the District of Columbia Circuit[3] reversed the Commission's order and re-

[1] *United Gas Improvement Co. v. Federal Power Commission*, 269 F. 2d 865 (3rd Cir. 1959)

[2] *Public Service Commission of New York v. Federal Power Commission*, 361 U.S. 195 (1959)

manded the case to the Commission with instructions to hold further hearings in which petitioners and other producer-applicants might if they so chose, "either augment the record so as to support certificate authorization without a price condition or to seek a certificate appropriately conditioned."

Significantly in each of these original certificate proceedings, the Commission decision was predicated upon rather limited contract negotiation and field price evidence. The purport of each remand thus being that the Commission, before issuing unconditioned certificates, should receive and consider more evidence not so limited. Thus it is the Commission's action following these judicial remands which is the subject of these appeals.

Contrary to procedure followed by the Commission in other remanded proceedings, when the foregoing judicial mandates were returned from the Court of Appeals, the Commission did not take immediate action.[4] Not until May 10, 1961, was each of the remanded proceedings consolidated with the Southern Louisiana Area Rate Proceeding, Docket No. AR61-2, *et al.* Some eight months later, without any hearing having been held in this area proceeding, on January 10, 1962, the Commission issued an order warning Respondents that the Commission might subsequently require as a condition to the re-issuance of permanent certificate authori-

[3] *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 146 (D.C. Cir. 1960) cert. denied 365 U.S. 880 (1961)

[4] In the remanded *CATCO* proceedings the Commission immediately issued temporary certificates containing refund clauses to replace the permanent certificates vacated by the Supreme Court.

zation that Respondents make retroactive refunds of any revenues received from the subject sales to the extent, if any, that such revenues exceeded the rates ultimately found to be in accord with the requirements of the public convenience and necessity. (R.395) On March 7, 1962, in denying Respondents' Application for Rehearing of the January 10 order, the Commission severed Respondents' respective certificate applications[5] from the Area Rate Proceeding in AR61-2 and consolidated them with other similarly remanded certificate proceedings for a "separate and expeditious disposition." (R. 410).

Pursuant to this March 7 order, hearings were commenced on July 18, 1962, ostensibly for the purpose of permitting Respondents to augment the record so as to support unconditioned certificate authority as directed or suggested by the judicial remands. However, a rather abbreviated hearing was held in which essentially all of the evidence offered by Respondents was summarily rejected. The only evidence admitted and considered was very limited field price evidence, the sole purpose of which was to determine a so-called "in-line" price for 1957-1958. All other evidence was held irrelevant and immaterial. This was in spite of the judicial mandates and the Commission's statement in its March 7 order that:

> "The instant proceedings, however, involve contracts executed after 1956; and we recognize that some parties may wish an opportunity to show that the appropriate price line in these proceedings differs from that we

[5] Margaret Hunt Hill, Trustee, Docket No. G-14109; Caroline Hunt Sands, Docket No. G-17398; Placid Oil Company, Docket No. G-13183, G-13184.

determined in *Catco. Furthermore, we shall not foreclose any party from presenting evidence which he believes would compel the conclusion that a higher price would be in the public interest.*" (R. 416-417) (Emphasis added)

After conclusion of such hearings, the Presiding Examiner issued an initial decision on December 7, 1962. Exceptions to this decision were filed by various parties. On July 17, 1963, the Commission issued its Opinion No. 398[6] essentially adopting the findings of the Examiner in which it re-issued permanent certificates of public convenience and necessity to Respondents and other producer applicants; however, this time around they were conditioned upon a reduction in initial price to 18.5¢ per MCF plus a 1.5¢ per MCF tax reimbursement, and a refund with interest of all amounts previously collected in excess of that reduced price. In addition, a moratorium upon the filing of any price increase in excess of 23.55¢ per MCF was imposed pending the issuance of final decision in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.

After timely filing petitions for rehearing and reconsideration, Respondents filed Petitions for Review in the Court of Appeals for the Fifth Circuit, alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion in which it found that the Commission erred in these remanded proceedings in the following three respects: (1) in excluding cost and economic evidence, (2) in ordering retroactive refunds with-

[6] In Re Placid Oil Company, *et al.*, Docket No. G-13183, *et al.*, 30 FPC 283, 30 FPC 682.

out predicating the amount of refunds upon a "just and reasonable" rate determination, and (3) in imposing a price moratorium on permanent certificates. In view of these findings, the court below did not consider other questions and errors urged by Respondents, namely, the validity of the Commission's "in-line" price determination, or the requirement that interest be paid on the amounts refunded.

SUMMARY OF ARGUMENT

Once again this Court is called upon to construe the extent and breadth of the Federal Power Commission's authority under Section 7 of the National Gas Act in issuing certificates of public convenience and necessity. Specifically, somewhat as a sequel to this Court's decisions in *Atlantic Refining Company v. Public Service Commission of State of New York*, 360 U.S. 378, (1959) (CATCO), and *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515, (1964) (Hunt), the Court is called upon to determine the propriety of the Commission's action in re-issuing certificates which had been judicially remanded to the Commission for further proceedings. The court below with *CATCO* and *Hunt* as the basis for its decision held that in this very limited frame of reference the Commission erred in (1) rejecting evidence in support of initial contract prices, (2) ordering refunds without determining that such amounts are unjust and unreasonable and (3) proscribing the filing of any price increases from 1958 through 1967.

1. Exclusion of Evidence: In relying upon this Court's *CATCO* and *Hunt* decisions, the court below was correct

in holding that the Commission erred in rejecting the proffered cost and economic evidence and that the Commission, in determining the price required by the public convenience and necessity, must receive and evaluate more than in-line price evidence. Moreover, these cases were judicially remanded for a fuller consideration of the price issue to afford Respondents opportunity to "augment" the record which already contained price data.

Price line evidence, consisting of price data relating to some but not all past sales, certainly is not all encompassing of the various aspects of the present or future public convenience and necessity. Evidence other than price data relating to a selected group of sales was especially critical in this case. The Commission in fixing the price line effectively freezes prices at the pre-Catco price levels without giving Respondents the opportunity to show "the reason why" their prices should be more than those selected by the Commission in 1957 and 1958.

The receipt and evaluation of such evidence is not the impossible task envisioned by Petitioners. Only three or four percent of the certificate applications require contested evidentiary hearings.[7] As demonstrated herein the Commission has ample resources and ingenuity to handle fairly this limited number of sales. Furthermore, consideration of cost and economic evidence need not necessarily be turned

[7] In 1962 96% and in 1963 97% of all independent producer applications were handled in non-contested proceedings. *42nd Annual Report of the Federal Power Commission to Congress* submitted January 9, 1963, and *43rd Annual Report of the Federal Power Commission to Congress* submitted January 3, 1964.

into a nigh interminable proceeding. As illustrated by a sale here involved, a full blown rate proceeding was tried in seven hearing days with an Examiner's decision issued within four months after the close of the hearing. The Commission's Rules and Regulations even require pipeline certificate applicants to present cost of service data. Such proceedings are not converted into full blown rate cases nor will it be necessary to convert every producer certificate proceeding into a full blown rate case. Regardless of the time required, the relevant and material evidence must be considered if the Act is to be properly administered.

There is no justification, prior to decisions in area proceedings as urged by Petitioners, for an interim standard for determining whether a sale is required by the present or future public convenience and necessity. To hold otherwise is to contend that Section 7(e) of the Act provides for two standards—one preceding area rates and a different standard thereafter. This is preposterous. There is only one standard under the Act and that standard requires the Commission to consider all factors prior to disposing of certificate applications.

2. Retroactive Refunds: Although disagreeing with the holding of the court below that the Commission had authority to require refunds in this case, Respondents do support the decision below, that refunds, if required, must be based on just and reasonable rates rather than the conditioned in-line price level. In the unique circumstances of this case, the court below adopted a procedure which balanced the equities of both consumer and producer. The con-

sumer is assured of gas at no more than just and reasonable prices, the ultimate goal of the Act. Likewise, the producer, if his contract price permits, will not be required to refund that portion of his rate which was just and reasonable. What could be fairer? This puts the parties in, as nearly as possible, the position they would have been in had the Commission properly conditioned the original certificates in 1958.

In ordering refunds on the sole basis of an in-line determination, without considering and evaluating Respondents' proffered evidence, Respondents have been denied due process of law and such action results in the taking of property without just compensation in violation of constitutional guaranties. Moreover, to measure the refunds by the in-line determination violates the specific provisions of Section 4 of the Act which provides that all rates be "just and reasonable" and any rate which is not just and reasonable is unlawful. In addition, to require refunds as a condition under Section 7(e) violates the provision which requires that all conditions be reasonable. It would be unreasonable to require producers to refund any portion of a just and reasonable rate, to force producers to serve consumers at a confiscatory rate or to sell gas at an unlawful rate. Moreover, the requirement of refunds based solely on the in-line determination has very serious and grave consequences with reference to these Respondents by causing them to suffer irreparable injury, by creating greater revenue deficiencies.

3. Price Moratorium: The imposition of a price moratorium under the guise of a Section 7(e) condition is nothing more

than an attempt to suspend rate increases. The permanent certificates here involved were issued in 1958 and 1959 and were never vacated. Thus the present moratorium, suspending rate increases for almost four years, was imposed some five years after the certificates were first issued. This court held in *CATCO (Atlantic Refining Company v. Public Service Commission of State of New York*, 360 U.S. 378 (1959) at page 390) that Congress did not give the Commission power under Section 7 to suspend rates. Although the Commission has requested an enlargement of its suspension powers, Congress has failed to extend that authority beyond the limited five months period under Section 4(e). The moratorium like the "in-line" price is a bar to just and reasonable rates. It will force some producer to serve consumers at confiscatory rates. The effect is to deny proper rates to consumers and producers without even considering the justifiable facts. Although upholding a moratorium in the issuance of *ex parte* temporary certificates, in *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515 (1964), this Court clearly indicated that the rate changing provisions of Section 4 become applicable at the time of permanent certification. Regardless, there is no need for a moratorium in this case as illustrated by the fact that some of the sales involved in this proceeding are being made at prices in excess of the moratory level and none have triggered increases of other prices.

ARGUMENT

Before considering the merits of Petitioners' arguments, one very important fact must be emphasized, a fact which Petitioners apparently disregard as immaterial. The certifiicates which are here under review were before the Commission as a result of judicial remands with specific directives to give the producer-respondents an opportunity to present evidence supporting an unconditional certification. Contrary to the implication by the Petitioners, this case did not involve "new gas", and does not involve the question of under what conditions should such gas be permitted to enter the interstate market. The issue before the Commission in July of 1963, the time of the Commission action, was rather at what price should the Commission reissue certificates for sales which had been made and irretrievably committed to interstate commerce for a period, in some cases, in excess of five years. This retrospective nature of the Commission's inquiry in this case distinguishes it from the usual Section 7 certificate proceeding.

Admittedly, in the typical Section 7 proceeding involving an initial commitment of gas to interstate commerce, it is the Commission's function after a careful analysis to prescribe, if necessary, any "conditions precedent to the entry of natural gas in interstate commerce"[8] so long as such conditions are reasonable. If the Commission prescribes conditions, the producer in such cases has the option to either accept the conditioned authorization and commit his gas to the interstate market or find another market for his gas.

[8] *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515, 526 (1964)

Unlike the ordinary Section 7 proceeding, the producers in this case were not afforded the choice of whether to commit their gas to interstate commerce.[9] This distinguishing "time" element although brushed aside by Petitioners cannot be over-emphasized, for it very clearly dramatizes the correctness of the decisions of the court below with respect to the issues decided. Of course, Petitioners' argument is not directed to these facts; it is directed toward the ordinary initial sale requiring certification. Although, as we will demonstrate, the court's decision may be applied to the ordinary Section 7 sales, there can be no doubt the decision below must be upheld as to the sales in this case.

I.

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE COMMISSION ERRED IN EXCLUDING ALL EVIDENCE OTHER THAN IN-LINE PRICE EVIDENCE.

The Commission, in determining the statutory issue of whether Respondents' sales were required by the public convenience and necessity, refused to consider any evidence other than that purporting to show whether such sales were in-line with a *selected* group of other sales in the area. Without deciding the propriety of the Commission's in-line determination, the court below held that, although an import-

[9] In its Order of March 7, 1962, setting these remanded proceedings for hearing the Commission made this clear:

> "By the same token, there can be no private option here to accept or reject the results of our initial rate review at the regulated company's whim, any more than a company is free to accept or reject the results of a rate review proceeding under Section 4 or 5 of the Act."

ant factor, whether the proposed contract prices were in-line was merely one factor to be weighed along with other factors in determining whether such sales were required by the present or future public convenience and necessity. In short, the court held that a proper consideration of the Act and this Court's *CATCO* decision compels the holding that the Commission does not fulfill its statutory duty by merely making a limited inquiry into whether the price is "in-line".[10] Moreover, the court below found that the Act requires the Commission to "hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held, that the proposed price is out of line." (R. 632)

The arguments now advanced by Petitioners in support of the Commission's "in-line price only" criteria for disposing of certificate cases may be categorized into two basic arguments. First, Petitioners assert that this Court in *CATCO* authorized a "fix and freeze" regulatory scheme which requires the Commission (1) to *fix* a so-called in-line price at the pre-*CATCO* price levels and (2) to *freeze* all subsequent sales at those prices until some pro-

[10] In view of its ruling that the Commission must consider more evidence, the court below did not decide the propriety of the Commission's finding. Therefore, that issue is not now before this Court. However, it is significant to note that this "in-line" determination was the *sole* basis upon which huge price reductions and refunds were ordered and that the Commission utilized only 41% of the sales made during 1957-58 and only 27.1% of the volumes of gas introduced into interstate commerce during such period (R. 558, 506; Ex. X-42, Sch. 3 & 4, R. 291-3). In fact, all prices above 18.5¢ were eliminated (R. 506, 558), with the Commission admitting that "25 percent of the 1957 contracts *not subject to court or Commission review* were priced at 21.3 cents or more, and 25 percent had a price 22 cents or more in 1958," (R. 557, 502; Ex. X-42, Sch. 7, R-297) (Emphasis Added)

spective just and reasonable determination can be made. Second, Petitioners argue that if required to do otherwise, effective regulation of producers under the Natural Gas Act will be administratively impossible. Neither of these arguments is well founded.

A. Neither the Natural Gas Act nor CATCO Authorizes a Price Freeze.

The requirements of Section 7(e) of the Act, the Commission's authority for the issuance of certificates, are mandatory and not discretionary. That section in pertinent part provides as follows:

> "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale * * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed * * * and that the proposed service, sale * * * is or will be required by the present or future public convenience and necessity * * *"

Since Respondents were willing and able to make, and had in fact been making for five years, the sales which were the subject of inquiry, the issue before the Commission was whether the sales were required by the *present* or *future* public convenience and necessity.

In determining this statutory issue, Section 7(c) of the Act specifies that "* * * the Commission shall set the matter for *hearing* and shall give such reasonable notice of *hearing* thereon * * *" The Administrative Procedure Act,[11] in defining evidence to be adduced during such administrative

[11] 60 Stat. 237-244, 5 USC 1001-1011.

hearings, provides that every litigant "* * * shall have the right to present his case by * * * evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."* Unquestionably, the Natural Gas Act contemplates and requires the receipt and consideration of evidence in determining the requirements of the *present* or *future* public convenience and necessity.

Especially was the 'right to be heard' imperative in this case, since the Commission was operating under specific judicial directives from the Court of Appeals, to hold further hearings in which Petitioners "* * * might * * * augment the record so as to support certificate authorization without price condition * * *",[12] and from this Court for "* * * a reconsideration and redetermination in the light of *CATCO*, * * *"[13] As this Court is aware, the very basis of the reversal of the Commission's action in *CATCO* was the lack of evidence, not the tender of 'too much' evidence.

Next, in considering what evidence is germane to a determination of the *present* or *future* public convenience and necessity, this Court has repeatedly emphasized "the importance of considering and evaluating all factors bearing upon the public interest." *Federal Power Commission v. Transcontinental Gas Pipe Line Cor.*, 365 U.S. 1 (1961). In *CATCO* this Court admonished the Commission to make "* * * a more careful scrutiny and responsible reaction to initial price pro-

* 5 USC 1007(c)

[12] *United Gas Improvement Co. v. Federal Power Commission* 269 F. 2d 865 (3rd Cir. 1959)

[13] *Public Service Commission of New York v. Federal Power Commission* 361 U.S. 195 (1959)

posals of producers under Section 7," emphasizing that "[t]heir proposals must be *supported by evidence* showing their necessity "to the present or future public convenience and necessity . . ." (360 U.S. at 391). (Emphasis added) In discussing the lack of evidence presented, the Court found significant that "no effort was made to give the reason why" the proposed price was some 70% higher than the weighted average cost of existing gas to the purchaser. (360 U.S. at 393).

More recently this Court in *Hunt* characterized the purpose of Sections 7(c) and (e) as affording "the Commission an opportunity to scrutinize the financial setup, the adequacy of gas reserves, the feasibility and adequacy of service, and the characteristics of the rate structure * * *" (376 U.S. at 525). Consideration of these factors, the Court recognized, makes "hearings under Section 7(e) for permanent certification * * * time consuming." (376 U.S. at 520.) In the same connection this Court suggested that if a producer wishes "to avoid the delay incident to a hearing for permanent certificate," (376 U.S. at 523), he may apply for temporary authorization.

It is apparent from *CATCO, Transco* and *Hunt* with their emphasis upon a time consuming hearing under Section 7, that this Court did not intend to transform the *present* or *future* public convenience and necessity into a mere 'in-line' determination. Certainly this Court in *CATCO* did not sanction a price freeze at 1956-58 price levels as urged by the Petitioners herein. The very basis of these remanded proceedings was for a reconsideration in the light

of *CATCO* wherein the Commission was reversed for failure to give the proper and full consideration to the price issue. To correct this error, the Commission has now ignored all other factors except the in-line price. Rather than heed the admonition of *CATCO* to give *full* consideration to price, the Commission has further restricted its consideration to only one facet of price. As the court below recognized, a consideration of the 'supply and demand' economic factors bears directly upon the price at which gas is required by the *present* or *future* public convenience or necessity (R. 629). To ignore considering such factors deprives the consumers the full protection envisaged by the Act.

The Fifth Circuit's construction of the Act and its interpretation of *CATCO* on this point, are not without support among other circuit court decisions. These decisions, some cited by Petitioners, although upholding the authority to certificate prices at the so-called in-line price levels,[14] have consistently rejected the contention that prices must be frozen at the pre-*CATCO* in-line price level.

The Ninth Circuit[15] rejected as being without merit the contention that the price line must necessarily accord with the pre-*CATCO* line. It went further to set forth factors and circumstances under which permanent unconditioned

[14] Significantly, in each of these cases upholding the in-line certification procedure, the issues were limited strictly to a determination of the appropriate price line and the Commission did not reject evidence offered by the producers purporting to show the reason why their prices, if out of line, should be certificated.

[15] *United Gas Improvement Co. v. Federal Power Commission*, 283 F. 2d 817, 821 (9th Cir. 1960), cert. denied, 365 U.S. 879 (1961).

certificates might be issued "notwithstanding the fact that the proposed price is out of line." Likewise, the Tenth Circuit[16] recognized that circumstances may require the certification of a sale when the price is out of line. The D.C. Circuit[17] and the Fifth Circuit[18] in earlier decisions suggested the same alternative.

Undeniably, the Commission's administrative burdens would be eased to some extent if hearings were not required in issuing certificates under Section 7. Regulation by *fiat* is immeasureably simpler than regulation required by the Act based upon hearings, evidence and argument. The computation of an in-line price, as the Commission has here done, which is an arithmetic averaging of selected prices, could as easily be done in chambers without the necessity of hearing. However, such could hardly be reconciled with the statute. Rather apologetically, the Petitioners admit that this is a deviation from the statute. They merely justify it as an interim measure to hold down prices until just and reasonable rates can be determined in the area proceedings. However, as the court below emphasized, regardless of how laudable its aim, the Commission must comply with the basic statutory framework. As the court noted, "* * * it is inconceivable that Congress meant to freeze rates to 1956-58 or to any other particular time for that matter." (R. 630)

[16] *United Gas Improvement Co. v. Federal Power Commission*, 287 F. 2d 159, 163 (10th Cir. 1960).

[17] *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 143, 149 (D.C. Cir. 1960).

[18] *United Gas Improvement Co. v. Federal Power Comission*, 290 F. 2d 133, 138 (5th Cir. 1961).

B. Regulation of Producers is Not Administratively Impossible Under the Act if Something Other Than an In-Line Price Standard is Utilized.

The Petitioners assert that consideration of evidence other than in-line evidence bearing on the public convenience and necessity issue would "hopelessly clog administration of the Act" (Comm. Br. p. 16). Such a requirement, according to PSC, would result in confusion of such proportions as to constitute "a nightmare at both the trial and initial decisional levels." (Br. p. 26) Great alarm is expressed that every producer certificate proceeding would be converted into long, drawn out "full blown" rate proceedings in which the voluminous evidence must be received and evaluated thus impairing the administration of the Act. Such speculative fears are without citation of factual support and are demonstrably false.

The Commission's own experience and its admission that the use of "in-line" or guideline prices in certificating new sales have been effective in holding the level of contract prices bely Petitioner's argument. An effective system of issuing certificates is not only possible under the Act but easily workable if the Commission will only recognize that a *few* cases must be decided on the basis of contested evidentiary hearings. Only a few producer applications for certificates coming before the Commission are contested; therefore, only a small number require evidentiary hearings. Even those need not be unmanageable or unwieldly with the receipt of evidence.

Virtually all certificate applications are disposed of in one of three ways:

(1) *Non-contested certificates.* Applications at or below the price line, or applications where producers will accept a price reduction to the price line upon permanent certification[19] are handled under a shortened certificating procedure, 18 CFR Sec. 1.20, which requires neither an appearance of the parties nor the introduction of evidence other than the sworn application filed by the producer. The bulk of all certificate applications are so handled. The Federal Power Commission 1963 Annual Report states that during 1962, "96% of all independent producer certificate applications were handled in this manner."[20] The 1964 Annual Report states that in 1963, 97% of all independent producer applications were thusly handled.[21] Therefore, only three or four percent of all sales now require evidentiary hearings!! This bears out the admission by the Commission that "experience has shown that once the firm, initial price has been set * * * many producers * * * will continue to operate at this figure." (Br. pp. 18-19) Since there are only a small number of certificate applications remaining (three or four percent), the Commission by statute may dispose of these proceedings after hearings with dispatch.

(2) *Conditioned Temporary Certificates.* If the price of a proposed sale is above the prevailing guideline price, the

[19] An example is cited in Appendix A, page 45 *infra*

[20] 42nd Annual Report of the Federal Power Commission to the Congress, submitted January 9, 1963, Page 89 thereof.

[21] 43rd Annual Report of the Federal Power Commission to the Congress, submitted January 3, 1964, Page 128 thereof.

producer may accept an appropriately conditioned temporary certificate.[22] He is thus able to commence deliveries of gas immediately and commit his gas to the interstate market. However, in so doing, he subjects himself to the burden of establishing that his higher price is required by the public convenience and necessity in a permanent certificate hearing, and to possible refunds if he fails. By following this alternative, the producer also gives up his option to reject the permanent certificate when tendered.

(3) *Permanent Certificate Hearings.* Finally, in cases in which consumer protection requires an evidentiary showing, the producer will be required to present sufficient evidence to show that the proposed sale is required by the present or future public convenience and necessity and the reason why the proposed price is appropriate. This will enable the Commission to consider all factors of the present and future public convenience and necessity and afford the producer an opportunity to accept or reject the tendered certificate.

The significant point about the latter two categories and on which the parties herein are at loggerhead is that the Commission must *receive* and *consider* proffered evidence. Of course, time will be consumed in hearing and evaluating the evidence in such proceedings, however, that is the express statutory purpose of requiring the producers to secure certificates of public convenience and necessity prior

[22] See Appendix "A".

to introducing their gas into interstate commerce. Thus, whatever time is required is in furtherance of the administration of the Act. To permit the Commission to ignore or defer consideration of relevant and material facts presented by any party would be in direct violation of the Act and not in the administration of the Act.

This case itself illustrates how few cases will require evidentiary hearings at all. Originally, some 74 dockets were consolidated in these proceedings. Now only the sales of eight producers remain for decision. Moreover during the period from January 1, to June 30, 1965, out of 827 certificates issued,[23] only three were conditioned to require a reduction in the initial sales price. Included in that number were many certificates issued after the producer accepted a proposal by the Commission to accept a permanent certificate at a conditioned rate. Presumably, these producers were willing to accept such permanent certificates at lower prices and avoid the experience and expense of a Section 7 hearing.

Furthermore, it is feasible that the Commission in the few proceedings requiring evidentiary hearings could receive cost evidence without converting such hearings into a full blown rate "nigh interminable" proceeding. The Commission now does just that in handling pipeline certificate ap-

[23] FPC Press Release No. 13844 issued May 25, 1965, covering first quarter, 1965 and FPC Press Release No. 13985 issued August 23, 1965, covering second quarter, 1965.

plications.[24] One of the more recent examples is the Transwestern Pipe Line Company consolidated proceeding, FPC Docket Nos. 20464, *et al.*, wherein the Commission's counsel specified that the cost of service studies were not shown for the purpose of converting this proceeding into a rate case or to recommend a precise method of allocation for the future but rather only to ascertain that the proposed rate is 'probably' just and reasonable.

The key to reducing the length and volume of the evidentiary hearing in disposing of this *three or four percent* is in the establishment of evidentiary standards or guides by which the parties can be guided in preparing their evidence for certificate hearings.[25] Once standards for the receipt and consideration of specific evidence are established, there will be no need for any of the parties to submit more than the minimum data required to dispose of the pertinent issues.

Of course, even without the guide lines, the so-called "full blown" rate hearing is not the nigh interminable monstrosity portrayed by Petitioners. This may be illustrated by the

[24] Federal Power Commission Regulations under Natural Gas Act, 18 CFR 157.14 requires that all pipeline applications include the following exhibits:

1. Exhibit "N" entitled "Revenues — Expenses — Income", which sets forth annual revenues, volumes of gas sold and operating expenses.
2. Exhibit "P" entitled "Tariff", shall, when the new rates will change the applicants' cost of service, include:
   (a) System cost of service for first year after new service commenced;
   (b) Allocation of such cost;
   (c) Rate base and rate of return;
   (d) Gas operating expenses functionally segregated;
   (e) Depletion and depreciation.

[25] *Morgan v. United States*, 304 U.S. 1 (1938); *Hill, Trustee v. Federal Power Commission*, 335 F. 2d 355 (5th Cir. 1964)

facts of this case. Respondent Sands filed an increase in its contract price to 24.55¢ per Mcf. — the same contract involved in this case. This increase, handled as a full blown rate hearing under Section 4(e), consumed only seven hearing days. Within four months after the evidentiary record was closed, the Examiner had rendered his decision holding the 24.55¢ price to be just and reasonable. These eight producers who remain in this proceeding could have been submitted to a "full blown" rate hearing in a much shorter time than this appeal has taken.

C. The Exclusive In-Line Price Standard Has Numerous Inherent Practical Weaknesses.

The practical application of the so-called 'in-line price only' standard or the 'fix and freeze' standard has numerous deficiencies. First, it has a rather serious impact upon the supply of gas to the interstate gas consumer. If in the issuance of certificates the Commission is restricted to sales which are in-line with other sales in the area, the gas producer may for legitimate reasons be forced to reject a certificate at such price levels and divert his gas elsewhere. There being no other proceeding under the Act by which he can present evidence establishing that his proposed sale is or will be required by the *present* or *future* public convenience and necessity, the Commission's in-line standard will forever preclude a presentation of justifying evidence. The resultant effect is that the supply is then lost to the interstate consumer. Especially is this tragic when the circumstances may be such, that had the Commission merely heard the producer's case, it, too, would have concluded

that because of other factors, the public convenience and necessity required the certification of the proposed sale irrespective of the in-line price determination. Certainly, such a possibility was contemplated by this Court when it called for the producers to show the 'reason why' their out-of-line prices should be certificated.

Likewise incongruous is the justification of the in-line standard on the basis that it applies only until the determination of just and reasonable rates on an area basis. Presumably at that time a different standard will be applied. This theory leads to preposterous results. It assumes that there are two statutory standards for public convenience and necessity — a *before* standard and an *after* standard! To state such a proposal demonstrates its absurdity. Its practical application is even more ludricous. Only four area rate proceedings have been initiated, only one has been completed. Is there one standard for determining the public convenience and necessity in the Permian Basin area where area rates have been established[26] while another standard is applicable in other areas where area rate proceedings have not even been instituted? Any *before* and *after* standard must be premised on something other than the Natural Gas Act.

Furthermore, this blanket price freeze concept until the area rates have been determined ignores the recognition by the Commission in its first area rate determination that there may be exceptions to the rates determined. The exceptional circumstances are to be considered in subsequent

[26] Area Rate Proceeding, Docket Nos. AR61-1, *et al.*, Opinion No. 468, issued August 5, 1965, ... FPC .....

hearings. If after the area rates there are exceptions whereby an applicant may show the "reason why" his sale should be permitted at a price higher than the area rate, there should also be such exceptional circumstances before the area rate determination.

The decision below on the evidence issue is unquestionably sound. The cases were remanded for the taking of additional evidence. All that Respondents sought was the opportunity to show "the reason why" their sales (among the only three of four percent requiring evidentiary hearing) should be certificated at their contract prices, assuming, without admitting, that their contract prices were out of line. The Commission erred in denying them the opportunity to show the 'reason why' and present justifying evidence. Such was required by the Natural Gas Act, by this Court's *CATCO* decision, by the specific judicial remands in this case, and contrary to Petitioners' assertions, the effect of the Court's decision will not impose upon the Commission an unworkable administrative burden in regulating under the Natural Gas Act.

II.

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE MEASURE OF REFUNDS MUST BE THE JUST AND REASONABLE STANDARD AND NOT THE IN-LINE STANDARD

The Petitioners next attack the decision below as to the measure of refunds authorized. Although the court below held that refunds were proper, "* * * to meet the exigencies of the unique case," it held that the amount of refunds "must

be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable one." (R. 640-641)

Respondents do not agree with the holding below to the extent that it authorizes refunds in this case. It seems obvious that in approving retroactive refunds, the court below has sanctioned a reparation order which this Court has held to be beyond the Commission's authority.[27] However, if refunds can validly be required, they must be predicated upon a "just and reasonable" determination rather than a so-called "in-line" price determination.

Petitioners contend that the proper measure for determining the amount to be refunded was appropriately fixed by the Commission at the so-called "in-line" price level.[28] Yet, no party pretends that the "in-line" price level so determined is "just and reasonable."[29]

The Act makes no provision for price refunds except under Section 4(e). Therefore, any retroactive refund requirement must be based on equitable principles. [30] In fact, in

[27] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). Cf. Brief of Petitioner, Ocean Drilling & Exploration Company, Case No. 26.

[28] The question of whether or not the "in-line" price was fixed at the appropriate level was not decided by the court below and is therefore not before this court. However, it is important to note that the "in-line" price was determined by an inquiry limited to the evaluation of price data relating to a *selected* group of sales. (Cf. f.n. 10 *supra)*

[29] Section 4(a) of the act declares any rate that is not just and reasonable to be unlawful. Not past rates, not present rates, not future rates, but any rate, past, present or future. Thus refunds, if any, must be measured by the just and reasonable rate level and not the "in-line" level.

[30] *Public Service Commission v. Federal Power Commission*, 329 F. 2d 242 (D.C. Cir. 1964) cert. denied 377 U.S. 963 (1964)

setting these remanded proceedings for rehearing the Commission stated: "The remedial action to be taken by us in either event will turn on the equities present." (R. 412) Thus, the inquiry is not whether Respondents should have received the money, but rather, having received it, whether they should be required to repay all or any part of it.

In this difficult and unusual situation, the decision below is fair to all parties, both consumer and producer alike. Its full import simply requires that the rates during both the prior period (1958-1963) and the future period (1963 and following) be "just and reasonable", no more and no less, except where prohibited by contract. What could be fairer? Neither party can thus reap a windfall at the expense of the other.[31]

As the court below recognized, the clock cannot be completely turned back to 1958, and the parties cannot be put in exactly the same position that they would have been had the Commission acted correctly in its initial certification. However, as PSC suggests, (Br. p. 32) the parties should, as nearly as possible, be put in that position. Recognizing this fact, the court below suggested a balancing procedure where-

[31] However, Petitioners contend that the standard suggested by the court below overlooks the consumer's benefit of the suspension period. They argue that had the Commission in the first instance acted correctly, and had the producers filed a price increase, such increase would have been suspended for the five months' statutory suspension period. This speculation does not detract from the solution arrived at by the court below, and furhermore, Petitioners have no objection to proceeding on that assumpion, i.e., assuming that the full suspension was imposed. Of course, to do so assumes that the Commission would have arbitrarily exercised its full suspension authority under Section 4(e). Such assumption hardly coincides with the purpose for which the Commission was given such suspension power.

by the producer would retain no more than the "just and reasonable" price during this interim period of 1958-1963. The consumer would thus be given exactly that which he is entitled under the Act and at the same time, the producers would not be subjected to the irreparable loss which they might suffer under the Commission's order.[32]

A. The Constitution Guarantees Every Party Due Process of Law and Just Compensation For Its Property.

The ordering of refunds of all amounts collected in excess of the so-called "in-line" price without receiving and evaluating Respondents' evidence violates constitutional guaranties. Especially is this true under the circumstances of this case, where the right to accept or reject the tendered certificates was not available. The Fifth Amendment to the United States Constitution provides in pertinent part that:

> "No person shall * * * be deprived of * * * property, without due process of law, nor shall private property be taken for public use, without just compensation."

Regardless of how the price level was determined, if such price level is to be used as a measure of refunds, evidence was clearly admissible as to whether such rate level was just and reasonable or confiscatory. The Commission denied Respondents the right to introduce evidence on either of these standards. The constitutional guaranty includes the right of a party whose rights are to be affected to introduce evi-

[32] This was essentially the alternative suggested by Commissioner O'Conner in his dissent (R. 586) that the measure of refunds should be computed on the basis of just and reasonable price levels.

dence and have judicial findings based upon it. *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 368-369, (1936).

Due process of law protects against arbitrary action. The form of a proceeding in which a person is permitted to defend his property rights cannot convert the process used into "due process of law" if the end result is to deprive him of his property without compensation. *Washington ex rel Oregon R. & Navigation Co. v. Fairchild*, 224 U.S. 510, 524 (1912). Thus, the hearing in which Respondents were permitted to defend one issue — the price line — but from which the relevant and material evidence was excluded, did not constitute due process.

Requiring Respondents to refund revenues based upon a rate level that will not yield sufficient revenues to pay operating expenses, taxes and provide a reasonable return on the property invested is a clear violation of these constitutional guaranties of just compensation and due process.

It has been approximately seven years[33] since Respondents commenced deliveries in reliance upon the unconditioned certificates. Their excluded evidence showed that the prices collected are insufficient to pay taxes, operating expenses and provide a reasonable rate of return on the property invested.

For Respondent Placid the prices collected yielded revenues to provide a rate of return of only 1.5% on gas in-

[33] Five years prior to the order on remand issued July 17, 1963, and two years since that date.

vestment under an allocation method previously used many times by the Commission[34], (Ex. X-2, R. 255) and a company-wide rate of return of only 8.6%[35] on all oil and gas operations (Ex. X-2, R. 256). Any reduction in the price or refunds based thereupon would reduce such rate of return (Ex. X-2, R. 256).

Respondents Hill and Sands suffer an even greater revenue deficiency. The price collected did not yield sufficient revenues to return all gas operating expenses (Ex. X-14, R. 267). The combined oil, liquid and gas current cost actually exceeded combined oil, liquid and gas income (including proposed gas rate increases), so that there was no revenue left to provide for a rate of return on the combined oil, liquid and gas investment (Ex. X-13, R. 264, 265).

Moreover, in a separate Section 4(e) proceeding[36] an Examiner found that a rate of 24.55¢ per MCF was just and reasonable[37] The Examiner's just and reasonable rate de-

[34] The application of this method was held to be deficient for Respondents in a separate rate proceeding *In Re H. L. Hunt, et al.*, Docket No. 467, *et al.*, by Opinion 369 and order issued November 30, 1962. 28 FPC 897. Upon review the Court of Appeals for the Fifth Circuit, *Hill, Trustee v. Federal Power Commission*, 335 F. 2d 355, (1964), remanded the case to the Commission with directions to afford these Respondents an opportunity to recast the evidence. However, a change in the application of this allocation method cannot affect the overall return of 8.6%, nor can any reasonable application of the method appreciably increase the 1.5% rate of return on gas properties.

[35] The Commission found a 12% rate of return proper for the gas producing industry in its Permian Basin Opinion No. 468 issued on August 5, 1965.

[36] In *Re Caroline Hunt Sands*, Docket No. RI 64-356.

[37] The Examiner's decision is pending before the Commission upon exceptions. Since the Section 4(e) rate increase was filed pursuant to the *court below issuing* a "stay" of the Commission's imposed price moratorium, the rate increase filing becomes moot if this Court reverses the court below and upholds the Commission's imposed price moratorium.

termination relates to the identical sale which Respondent Sands has involved in the instant case.

If Respondents are required to refund any portion of the revenues based upon the prices collected, they will suffer even greater deficiencies. Furthermore, since there is no provision under the Act by which Respondents can recoup revenues returned to the purchaser even if they are later found to be justly entitled to them, the effect of the Commission's refund order is not only to forever deny Respondents the right to a just and reasonable rate for at least seven years, but to impose confiscatory rates for seven or more years in violation of Respondents' constitutional rights and privileges.

B. A Condition Requiring The Refund of Amounts Collected Under a Just and Reasonable Rate Is Not Only Not Reasonable But Is In Direct Conflict with the Natural Gas Act.

Section 4(a) of the Act requires all rates to be just and reasonable and any rate that is not just and reasonable is unlawful. All Petitioners would agree that there is no other way under the Act to determine the justness and reasonableness of any rate without receiving and evaluating cost and economic evidence. Thus, it would be in direct conflict with the Act to require refunds if the rate level was just and reasonable. Therefore, a condition requiring Respondents to refund any amount collected from prices which are below the just and reasonable rate level would not only be unreasonable but absurd.

Since Congress did not give the Commission power under Section 7 to suspend rates[28] nor to fix rates[29], the only basis for requiring a refund under a Section 7(e) condition, which is the basis of the Commission's order, is found in the last sentence of Section 7(e) which provides:

> "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions as the public convenience and necessity may require.*" (Emphasis added)

What is reasonable? Obviously it would be unreasonable to impose a condition requiring Respondents:

(1) to refund any portion of a just and reasonable rate,

(2) to serve consumers at a confiscatory rate; or

(3) to sell gas at an unlawful rate.

It would also be unreasonable to impose conditions which would preclude the Commission for at least one third of the contract term from determining whether a rate is confiscatory, just and reasonable, or otherwise lawful.

In *CATCO*, the authority relied upon for the "in-line" doctrine, this Court held that the gas operator may:

> "unless bound by contract, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373, file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension * * * This not only gives the natural gas company opportunity to increase its rates where justified but likewise

[28] *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959)

[29] *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 US. 332 (1956).

guarantees that the consumer may recover refunds for moneys paid under excessive increases." (360 U.S. at page 389)

Section 4(d) of the Act prevents Respondents from filing rate increases retroactive to the date of original certification as was contemplated by this Court in *CATCO*. To prevent detriment to the consumer in case the rates collected were excessive and to avoid irreparable harm to the producer in case the reduced rates were below a just and reasonable level, the court below ruled that Respondents must refund all amounts collected above the just and reasonable level determined in accordance with Sections 4 and 5 of the Act. What could be fairer or more just?

III.

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE COMMISSION DOES NOT HAVE THE POWER UNDER SECTION 7(e) OF THE ACT TO SUSPEND RATES UNDER THE GUISE OF THE MORATORIUM.

Based upon the rationale of this Court's decision in *Hunt*[40] and the well established principle that rate making powers are vested solely in natural gas companies, *Mobile*,[41] the court below held that the Commission erred in imposing an additional four-year moratorium as a condition to the reissuance of permanent certificates in this case. The Petitioners in attacking this holding argue that this Court in

[40] *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515 (1964).

[41] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

Hunt approved similar moratoriums as a condition to the issuance of temporary certificates and that the same justification exists in the issuance of permanent certificates. Petitioners further contend that this extension of this Court's decision in *Hunt* to permanent certificates is supported by this Court's later decision in *Texaco.*[42] A careful analysis of these decisions in the light of the facts of this case will, however, rather than support the Commission's moratorium, emphasize and dramatize its unlawfulness and illegality.

First, lest there be any confusion over semantics, the present "moratorium" is simply a means of suspending Respondents' contract prices for an additional four-year period (1963-1967).[43] Call it "moratorium" or any other name, the 'suspension' effect cannot be camouflaged. Such a condition cannot be confused with the conditions involved in *Hunt* and *Texaco,* which were proscriptions on the filing of price increases as a condition to the entry of gas in the interstate market. Here, as has been stated, the subject gas had been flowing in interstate commerce for in excess of five years before the imposition. As a substantive and practical matter,

[42] *Federal Power Commission v. Texaco, Inc.,* 337 U.S. 33, (1964).

[43] Black's Law Dictionary, Fourth Edition, 1951, defines moratorium as:

> "A term designating a suspension of all, or of certain, legal remedies against debtors, sometimes authorized by law during times of financial distress."

Similarly, Webster's New International Dictionary of the English Language, Second Edition, Unabridged, defines moratorium as:

> "A period of permissive or obligatory delay; specif., *Law,* a period during which an obligor has a legal right to delay meeting an obligation, eps. such a period granted to an emergency, as to a bank or debtors generally, by a moratory law."

the Commission's order, by means of its retroactive refund requirement and future moratorium provision, suspended for almost ten years the effectiveness of the contract price schedule, without at any time during this interim affording Respondents an opportunity to justify their contract prices. No authority can be found in the Act or elsewhere for such action.

The only statutory authority for suspending rates is found in Section 4(e) of the Act. However, this power was restricted by Congress as to both time (five months) and purpose (to review and determine the lawfulness of the rates proposed). Significantly, Congress did not authorize even in Section 4 such broad suspension powers as the Commission here proposes to exercise.[11] Likewise significant is the fact that limited though the suspension power may be, Congress did not grant any suspension power under Section 7(e) of the Act. In exhorting the Commission to properly exercise its conditioning powers under Section 7 in prescribing the conditions under which gas may enter the market, this Court has emphasized the lack of suspension power under Section 7. In *CATCO* the court stated:

> "Moreover the fact that *the Commission was not given the power to suspend initial rates under Section 7 makes it the more important.*" (360 U.S. at page 390) (Emphasis added)

[11] In fact, Congress has refused to extend the suspension period. In 1962 the Commission recommended to Congress that the Section 4 suspension period be extended for a further period not exceeding three months beyond the statutory five month period. See Forty-Second Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1962, Page 16. This recommendation was not adopted.

Similarly in *Hunt*:

> "Nor does Section 7 grant the Commission power to suspend the rate authorized in permanent or temporary certificates issued under that section. Once a permanent certificate is granted the Commission can correct an improper rate only under Section 5 of the Act, 52 Stat 823, 15 USC Section 717 d, which likewise has no suspension provision." (376 U.S. at page 521)

As the court below held, the correctness of its holding that the Commission is without power to suspend Respondents' contract prices is demonstrated by the facts of this record:

> "For applications filed in 1958, the Commission asserts the power to compel the producer to sell gas for nearly ten years at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period through the guise of a 'price' condition, the Commission obtains an irrevocable dedication of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route." (R. 635)

This is, of course, in accord with the well established judicial principle that rate making powers are vested solely in the natural gas companies, and that the power granted the Commission "is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them." *Mobile* (350 U.S. at page 341). The right of a natural gas company to make rate increase filings consistent

with its contract has been consistently upheld and assumed in reviewing the Commission's conditioning authority.[45]

Of course, disregarding *arguendo* the peculiar facts of the present case, this Court in *Hunt* discussed in some detail the interplay of Sections 4 and 7 of the Act. In emphasizing the power of the Commission to lay down conditions precedent to the entry of gas into interstate commerce (i.e., temporary certificates), this Court explicitly specified the point at which the filing privileges of Section 4 become applicable.

> "Under the procedures of the Act, it is at the point of *permanent or unconditional temporary certification* that the provisions of Section 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section." (Emphasis added) (376 U.S. at page 523)

Further, in upholding the temporary moratorium as a condition to the issuance of *ex parte* temporary certificates, this Court specifically said:

> "In view of the ex parte nature of the proceeding it appears only fair to all concerned that the condition upon which the rate was temporarily certificated be continued unchanged until the permanent certificate is issued." (376 U.S. at page 523)

Thus, it is clear that a price increase proscription is not proper in a permanent certification, even in the normal, ordinary case, for at that point Section 4 of the Act has exclusive control over the changing of the filed rate schedule.

[45] *Willmut Gas and Oil Co. v. Federal Power Commission, et al.*, 294 F. 2d 245 (D.C. Cir. 1961); *Texaco, Inc., et al., v. Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961); *Atlantic Refining Co. v. Federal Power Commission, et al.*, 316 F. 2d 677 (D.C. Cir. 1963); *California Oil Co., Western Div. v. Federal Power Commission*, 315 F. 2d 652 (10th Cir. 1963).

However, regardless of the right to impose such conditions in the normal, ordinary case, such conditions are clearly improper in this case where the permanent certificates were issued in 1958 and 1959 and were never vacated (R. 395) and the imposition first appears in 1963. It takes a great deal of imagination to call the present conditions an exercise of "rate review" and not "rate making" when it simply perpetrates for another four years the price freeze which has been imposed for the preceding five years due to the refund requirement condition.

Petitioners argue that the necessity for the moratorium is to prevent triggering of other prices in the area. The lack of necessity for the imposition of the moratorium is clearly evidenced by the facts of this case. Respondents Placid and Hill are now collecting, pursuant to Section 4, 25.55¢ per Mcf from two of the very sales here involved! The 25.55¢ sales prices have been effective since December 1, 1962.[48] Moreover, Respondent Sands has been collecting for the sale it has involved, 24.55¢ per Mcf since May 1, 1964. Significantly, this increase was filed and made effective as a result of a stay granted by the court below. However, not one increase has been "triggered" by the filing and collection of these contractually authorized prices. Even more significant is the fact that after a full hearing under Section 4(e) concerning the lawfulness of the 24.55¢ price, the Examiner's decision, still pending before the Commission, held such in-

[48] These price increases were filed in accordance with the price provisions of their respective contracts. The Commission after a full hearing disallowed the increases in Opinion No. 369, 28 FPC 897. Its action in so doing was, however, subsequently reversed in *Hill, Trustee v. Federal Power Commission*, 335 F. 2d 355 (5th Cir. 1964).

creased price to be "just and reasonable."[47] Be it remembered that just and reasonable prices are the ultimate goal of the Act.

Thus, as the court below recognized, the Commission's moratorium order cannot be sustained because (1) it, as a practical matter, is a suspension order which is beyond the Commission's authority under the Act, and further (2) it unlawfully invades the field of rate making which according to this Court is controlled by Section 4 of the Act at and subsequent to issuance of permanent certificates, and finally, (3) there is no need for a moratory in the present case, since the Commission's fears of "triggering" were unfounded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the court below be affirmed.

Respectfully submitted,

ROBERT W. HENDERSON,
1401 Elm Street,
Dallas, Texas 75202,
THOMAS G. CROUCH,
3330 Republic Bank Tower,
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PAUL W. HICKS,
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September 29, 1965

[47] This finding by the Examiner illustrates the injury which Respondents will suffer if the proscribed rate levels are ultimately found to be just and reasonable. No remedy exists for them to recoup the revenues authorized by contract which they will have lost during the so-called moratorium period. *Sohio Petroleum Co. v. Federal Power Commission*, 298 F. 2d 465 (10th Cir. 1961). Such injury is much more irreparable than any defects that may exist in the suspension and refund procedures provided for in Section 4 of the Act.

APPENDIX A

Sept. 10, 1965

In reply refer to:
BNG-IP/GC
Docket No. G-19437
Continental Oil Company

Continental Oil Company
P. O. Box 2197
Houston, Texas 77001

AIRMAIL

Attention: Mr. Fred T. O'Leary

Gentlemen:

Based upon the allegations presented in the statement to invoke Section 157.28 of the Commission's Regulations filed in the application to amend the certificate issued in Docket No. G-19437, the Commission finds that an emergency exists within the meaning of the Natural Gas Act, and a temporary certificate is hereby issued to Continental Oil Company in this proceeding pursuant to Section 7 of the Act to sell gas to Southern Natural Gas Company from additional acreage in the Bayou Long Field, Iberia Parish, Louisiana.

This temporary certificate is issued subject to the following express conditions:

(1) The total initial price for such service shall be 21.25¢ per Mcf at 15.025 psia subject to Continental Oil Company refunding to Southern Natural Gas Company from the date of initial delivery, with interest at 7% per annum, any amounts collected in excess of the amounts resulting from the rate finally determined to be required by the public convenience and necessity in Docket No. G-19437, as amended. Refunds shall not be required below a total rate of 20.0¢ per Mcf at 15.025 psia, inclusive of any tax reimbursement.

(2) The above price shall remain in effect until changed by Commission order in this proceeding, Docket No. G-19437.

(3) The filing within 30 days hereof of a supplement to the rate schedule consistent with the price in (1) above and a billing statement reflecting such initial price.

(4) The temporary certificate with conditions attached shall be accepted as issued within 30 days herefrom by written acceptance made by a responsible official of the company (original and five copies). If reconsideration of such temporary certificate is sought, service hereunder shall not be commenced. If service is commenced under this temporary certificate, the conditions attached shall become effective and service may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

The related proposed rate schedule supplements will be considered accepted for filing upon compliance with the above conditions to be effective on the date of initial delivery, subject to the provisions of Sections 154.94(c) and 154.101 of the Commission's Regulations under the Natural Gas Act.

The rate schedule supplements have been designated as follows:

Description		*Designation*
Letter Agreement	12-1-64	Supplement No. 11 and
Letter Agreement	6-3-65	Supplement No. 12 to Continental Oil Company FPC Gas Rate Schedule No. 172

Please advise the Commission of the date of commencement of deliveries under such rate schedule supplements, making reference in your communication to the rate schedule supplements designated above.

This temporary certificate and the acceptance of the above rate schedule supplements are without prejudice to such

final disposition of the application to amend the certificate as the record may require.

Please advise the Commission as to whether your company would be willing to accept a permanent certificate for sales from the additional acreage at a rate of 20.0¢ per Mcf at 15.025 psia, inclusive of any applicable tax reimbursement. Such acceptance may permit disposition of the subject application to amend after a statutory hearing held before the Commission without further notice provided no protests in opposition to such application to amend remain on file. Under such procedure, unless otherwise advised, you need not appear nor be represented at the hearing.

If services are not commenced within 90 days from the date of this temporary certificate, it shall be void and of no effect.

By direction of the Commission.

Secretary

cc: Southern Natural Gas Company
P. O. Box 1513
Houston, Texas 77001